United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1421

To be argued by
FRANK H. WOHL

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1421

UNITED STATES OF AMERICA,

Appellee,

—v.—

JACK NATHAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Jack Nathan appeals from a judgment of conviction entered on December 8, 1975, in the United States District Court for the Southern District of New York, after a six-day trial before Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Indictment 74 Cr. 377 was filed in ten counts on April 11, 1974. Counts One through Four charged Nathan with attempting to evade his personal income taxes for the tax years 1967 through 1970, in violation of Title 26, United States Code, Section 7201. Counts Five and Six charged Nathan with attempting to evade the corporate taxes of Nathan, Nathan & Nathan, Ltd. for the tax years 1969 and 1970, in violation of Title 26, United States Code, Section 7201. Counts Seven through Ten charged the defendant with filing false corporate income tax returns for Nathan, Nathan & Nathan, Ltd.

for the tax years 1967 through 1970, in violation of Title 26, United States Code, Section 7206(1). Indictment 75 Cr. 949 was filed in two counts on September 29, 1975 superseding Counts Nine and Ten of the original indictment.

The trial commenced on October 1, 1975. On October 9, 1975 the jury returned a verdict of guilty on Counts One through Four and reported that it had not yet reached a decision on the remaining four counts.* On October 10, 1975, Judge Bonsal discharged the jury, declaring a mistrial on Counts Five through Eight.

On December 8, 1975, Nathan was sentenced to concurrent terms of nine months' imprisonment on each of the four counts on which he was convicted and fined $10,000 on each count. Nathan remains at large pending this appeal.

Statement of Facts

The Government's Case

During the years 1967 through 1970 Jack Nathan, the defendant, was the owner and operator of several bill collection agencies (Tr. 169, 377),** one of which was Nathan, Nathan & Nathan, Ltd., a company which specialized in collection of bills due hotels. (Tr. 29).***

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* The Government had earlier consented to dismissal of Counts Seven and Eight of the original indictment (Tr. 561). Superseding Counts One and Two of Indictment 75 Cr. 949 were therefore submitted to the jury as Counts Seven and Eight.

** "Tr." refers to pages of the trial transcript; "GX" refers to Government Exhibits; "Br." to appellant's brief.

*** The other companies owned by the defendant were Airlines Association, Credit Card Association, Bokar Realty Corp., Orbank Realty Corp., and several inactive corporations (Tr. 337). The defendant also owned a seat on the New York Produce Exchange. (Tr. 345).

The company was wholly owned by Nathan until 1969 when he purported to transfer an interest in it to his wife for an undisclosed consideration. (Tr. 318).* Nathan was also the president of the company. In that capacity, he signed the company's tax returns (GXs 6A-6H) and substantially all checks written on the corporation's checking account. (GXs 31-157, 377-440, Defendant's Exhibit D).**

In the normal course of business Nathan, Nathan & Nathan, Ltd. collected delinquent bills due its client hotels, deposited those receipts in its own bank account, kept its commission, usually 35%, and then remitted the remainder to the client hotel.*** These payments to client hotels were reflected on the books of Nathan, Nathan & Nathan as "refunds." The gross receipts of Nathan, Nathan & Nathan reported on the company's tax returns for 1967-1970 were computed by subtracting the "refunds" to hotels from the company's gross collections. (Tr. 197-99).

An analysis of the books and records of the company showed, however, that many items reflected on the books of Nathan, Nathan & Nathan, Ltd. as "refunds" were not in fact "refunds" at all, and consequently the errone-

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* Prior to this transfer Nathan, Nathan & Nathan filed tax returns as a small business corporation under Subchapter S of the Internal Revenue Code. The alleged transfer of shares to his wife in 1969 allowed the defendant, who informed his accountants of the transfer in 1971, to cause the corporation to file tax returns as a regular corporation for the years 1969 and 1970. These returns were not filed until 1971. (Tr. 401, 508-20).

** Many of the corporate checks were for personal expenses or investments of the defendant and were so designated in the corporate books. Nathan did not maintain a personal checking account. (Tr. 344, 397, 411).

*** Occasionally the debtor paid the hotel directly, and the obligations between Nathan, Nathan & Nathan and the hotel would be adjusted accordngly.

ous classification of these items as "refunds" resulted in understatements on the company's tax returns of its gross receipts by an aggregate amount of over $60,000 for the four years. (GXs 339, 340). The items incorrectly classified as "refunds" fell into two categories: (1) checks drawn payable to hotels but cashed by the defendant (Tr. 436-41, 457; GX 336) and (2) checks of Nathan, Nathan & Nathan drawn to hotels but never presented to the company's bank for payment. (Tr. 447-57; GX 338).

In January 1966, Nathan hired Alan Edwards, an experienced certified public accountant,* to prepare his 1965 personal and corporate tax returns and maintain the books of his companies. (Tr. 22-29).** In February 1966 Edwards notified Nathan that he could not prepare the tax returns until the records were corrected in various respects. Edwards told him that to conform to the tax laws it would be necessary, among other things, to reverse certain entries in the corporate books which reflected large amounts as "refunds" paid to hotels which were in fact stale outstanding checks. (Tr. 32-34, 76-78).*** Edwards told Nathan that the company's books showed its checking account to be overdrawn in an amount

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* Edwards had been certified in 1941 in New York, 1942 in New Jersey and 1975 in California. (Tr. 21).

** When Edwards was hired, he went over with the defendant the bookkeeping methods followed by the company. (Tr. 73). Edwards also told Nathan that he would only take the job on the condition that some of the accounting work would be done by Edwards' subordinates. (Tr. 74).

*** Edwards also told the defendant that his practice of reporting some December receipts as received in January was improper; that he could not deduct expenses such as gifts, travel and entertainment without detailed records and diaries to support such expenses (Tr. 35-39); and that his treatment of a rent deposit as an expense was improper for tax purposes. (Tr. 42-43).

of slightly over $8,000,* and that this apparent overdraft could only be accounted for by a large group of stale outstanding checks issued during the years 1963 through 1965 in an aggregate amount approximately equal to the apparent overdraft. (Tr. 32, 56).

When in February and March 1966 Nathan failed to respond to Edwards' insistence on a "definitive answer" concerning these adjustments and additional supporting information on other items, Edwards refused to prepare and file the tax returns and obtained an extension of time for the defendant to file late returns. (Tr. 41-46; GX 1, 3). Shortly thereafter, Nathan discharged Edwards and obtained another accountant, Sanford Katz. (Tr. 47).

Katz, who had commenced his practice about two years earlier and had very little business,** promised to prepare and file the 1965 returns immediately, which he did. (Tr. 171-72). Katz testified *** at trial that he had not heard Edwards say anything to Nathan about the outstanding check problem and that Nathan had said in an argument with Edwards that he was dismissing Edwards because of Edwards' failure to file the tax returns on time and Edwards' practice of having his subordinates do some of the defendant's accounting work.**** (Tr.

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* Edwards also told Nathan that the Internal Revenue Service would not allow him to deduct expenses represented by checks not covered by adequate funds in the corporate bank account. (Tr. 32-33).

** Katz testified that he had been certified in 1964 (Tr. 167); that when he was hired by the defendant, his other practice "might have been eight or ten very small accounts"; and that the defendant's companies constituted his largest account throughout the period 1966 through 1970. (Tr. 336).

*** Katz was called by the Government, but rapidly became identified with the defendant. (See, *e.g.*, Tr. 224-26). Accordingly the trial judge allowed the Government to impeach Katz' credibility on redirect examination. (Tr. 333-40).

**** Katz apparently had no subordinates.

251, 340). In the grand jury, however, Katz had testified that in a final argument between Edwards and the defendant, he had heard Edwards mention the outstanding check issue. When confronted with this prior testimony at trial, Katz said Edwards had told him about the outstanding check problem outside of Nathan's presence, and that Katz had not understood what Edwards was talking about. (Tr. 340-43).

After filing the defendant's 1965 tax returns in April 1966, Katz took over the regular accounting duties for the defendant. Katz began by spending about two days per month at the defendant's premises (Tr. 179), where his normal functions were to write up the cash disbursement journal from the check stub book and then to transfer totals to the general ledger and to prepare bank reconciliations. (Tr. 173-77).

Katz testified that in 1966 or 1967 he "mentioned the outstanding checks," some of which were by then over two years old, to Nathan who said he had instructed his bank to pay the checks if they were ever presented for payment. (Tr. 213-14, 292, 389).* Meanwhile, the outstanding checks continued to build up on the com-

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* Katz also testified that on occasion checks were presented for payment after remaining outstanding for several months. (Tr. 292). The corporation's bank reconciliations for the years 1967 through 1971 (GXs 441-44) showed, however, that none of the checks written in 1963 through 1966 which were shown as outstanding on the 1967 and 1968 reconciliations were ever paid by the company's bank account, because the aggregate dollar amounts of outstanding checks for the years 1963 through 1966 were the same on the 1967, 1968 and 1971 reconciliations. (Tr. 214-15). In addition, an audit conducted by the Internal Revenue Service in 1971 confirmed that enormous amounts of checks over a year old remained outstanding. (Tr. 447-56).

pany's books so that by 1971 checks of the following vintage and in the following amounts were outstanding:

Checks Written in	*Aggregate Dollar Amount*
1963	$ 5,310.56
1964	3,119.12
1965	5,036.87
1966	5,712.70
1968	11,892.96
1969	12,671.42
1970	5,958.54
Total	$49,702.17

(GX 338, 441-44; * Tr. 447-56)

The defendant's and the corporation's tax returns for the years 1967 and 1968 were prepared by Katz, without making any adjustments for the outstanding checks which had been erroneously classified as "refunds." (Tr. 220, 457-61, 465-77; GXs 339, 340). The corporation's 1969 and 1970 returns were not filed until 1971,** well after the Internal Revenue Service had begun, in mid-1970, to audit the defendant's returns. When filed delinquently, the 1969 and 1970 returns contained adjustments adding certain *** stale outstanding checks to income.

Besides his treatment of outstanding checks, during the years 1967 through 1970 the defendant drew over 100 checks in an aggregate amount of $36,120 payable to

* The bank reconciliations included no total for checks written in 1967.

** The Government told the jury that this tardiness was not the basis of the prosecution. (Tr. 8-9). Katz testified that the defendant was unaware that the returns had not been filed on time. (Tr. 228).

*** The 1969 corporate return treated as income the totals of outstanding checks for the years 1963 and 1964. The 1970 return treated as income the 1965 outstanding checks; the 1971 return treated as income the 1966 outstanding checks. (Tr. 234).

the Waldorf-Astoria, the St. Moritz Hotel, the New York Hilton and the Statler-Hilton and cashed them at those hotels. (GXs 31-145, 336).* The amounts and number of checks for the years in question were as follows:

Year	*Number of Checks*	*Aggregate Amount*
1967	33	$ 9,485
1968	29	9,480
1969	32	10,485
1970	18	6,670

(GXs 31-145, 336).

The defendant signed all of the checks and wrote most of the check stubs himself, but made no entries on the stubs to distinguish the cashed checks from the "refund" checks to the hotels. (Tr. 548; GXs 11-30). Nor did Nathan inform either of his accountants, Edwards or Katz, that he was cashing these checks or that they were not "refund" checks. (Tr. 224, 337). Rather, he told Katz that checks to hotels were "client checks", confirming Katz' assumption that they should be treated as "refunds." (Tr. 395). Consequently, the cashed checks were erroneously categorized as "refund" checks rather than as payments to Nathan, and he improperly excluded the amounts represented by these checks from both his and the corporation's taxable income. (Tr. 457).**

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* The Government also established that Nathan had engaged in this practice during the years 1964 through 1966. (GXs 147-57, 377-440; Tr. 113-14).

** Since Nathan, Nathan & Nathan filed tax returns as a Subchapter S corporation for the years 1967 and 1968, the corporation itself paid no tax, but the defendant, as the corporation's sole shareholder, was taxed on the corporation's profits. The understatement of the corporation's gross receipts and profits therefore resulted in an understatement of the defendant's taxable income. Since Nathan, Nathan & Nathan filed tax returns as a regular corporation for the years 1969 and 1970, understatement of the corporation's profits resulted in a corporate tax deficiency, and failure of the defendant to report as income the cashed checks, which were dividends to him, also resulted in a personal income tax deficiency. (Tr. 473-75).

The Defense Case

The defense presented no witnesses but did introduce into evidence all of the bank statements, cancelled checks and accountant's work papers of Nathan, Nathan & Nathan, Ltd. for the period from December 1965 through December 1970, which had not been introduced by the Government. (Defendant's Exhibits D-I; Tr. 584-87).

ARGUMENT

POINT I

The evidence established that Nathan's tax violations were wilful.

Nathan's claim that the evidence was insufficient to establish the wilfulness of his tax violations is without merit. The evidence at trial clearly showed, as the jury found, that the defendant knowingly and wilfully employed two devices to evade his personal taxes for the tax years 1967 through 1970.

Those two devices were, first, his refusal to order that entries reflecting stale outstanding "refund" checks on the books of Nathan, Nathan & Nathan be reversed to show that the checks had not been paid by the company's bank account, and, second, his cashing of checks which were falsely reflected on the books of the company as "refunds" to client hotels. Through those devices the defendant caused Nathan, Nathan & Nathan to overstate "refunds" to client hotels thereby understating its gross receipts and profits. The corporation's understatement of its profits for the years 1967 and 1968 directly resulted in an understatement of the defendant's personal income because during those years the corporation filed its tax returns as a Subchap-

ter S corporation whose profits constituted income to the defendant. For the years 1969 and 1970, when the corporation filed tax returns as a regular corporation, the defendant's primary evasion scheme was his failure to report as income the proceeds of checks he cashed at hotels which checks were, in fact, dividends to him since they constituted a distribution of corporate profits, rather than "refunds." (Tr. 508-20).

The Government established the defendant's wilfulness with respect to the outstanding check scheme by direct evidence. Allen Edwards testified that he told Nathan in 1966 that the practice of showing old outstanding checks as "refunds" was an improper method of accounting which resulted in an understatement of the company's profits, and that he would not prepare the defendant's tax returns until appropriate adjustments were made. (Tr. 33-34, 66, 76).* Nathan responded by

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* Edwards also testified on direct examination, that he could not "pin . . . [the defendant] down" or get an "affirmative answer" to his warnings on this subject. (Tr. 43-44). On cross-examination Edwards testified that Nathan specifically told him not to make adjustments writing off the outstanding checks and adding them back to income. (Tr. 76).

In this Court the defendant attacks the credibility of Edwards' testimony on this point because Edwards was more explicit on cross-examination than he was on direct. The defense implies that Edwards fabricated this testimony because he was offended by defense counsel's vigorous cross-examination. (Defendant's Appendix, A-4). This suggestion, however, overlooks the fact that in an affidavit sworn to by Edwards on October 5, 1973, two years before the trial, Edwards said:

> "I brought these outstanding checks to the attention of Jack Nathan as well as the fact of the negative bank balance. Jack Nathan was unconcerned about them and told me to leave them alone.
>
> * * * * *
>
> I told Jack Nathan that it was my opinion that the Internal Revenue Service would not allow the deduction for the checks which had been outstanding. I left the outstanding checks as they were upon Jack Nathan's direction." (Defendant's Exhibit B).

terminating his relationship with Edwards. (Tr. 47). Sanford Katz, the accountant who succeeded Edwards, also testified that Nathan was aware that many outstanding checks were being carried on the books of Nathan, Nathan & Nathan. (Tr. 213-14. See also Tr. 339-43, 389-91).* Indeed, the jury could hardly have

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* The defense asserts that Katz and Dunst, the accountant who preceded Edwards, agreed that the outstanding checks should remain on the company's books as "refunds." (Br. at 45). The record supports no such claim. There was no evidence of Dunst's views or why he and the defendant severed their relationship; and Katz testified that he believed that proper accounting practice would have required that the checks be written off and charged back to income, but he seemed at a loss to explain why he did not follow what he knew to be proper accounting practice. (Tr. 387-89).

The defense claim that "no effort was made to conceal" the outstanding checks (Br. at 45) is not quite accurate either. On cross-examination, Katz testified that he informed the Internal Revenue Service of the outstanding checks by turning over to an Internal Revenue agent the company's 1968 bank reconciliation. (Tr. 301). The Government then introduced that document showing it to have been erased to obscure the age of the outstanding checks on the company's books. (GX 441A). Katz testified that he may have given the Internal Revenue agent another bank reconciliation and that he did not know how the erasure had occurred. (Tr. 359-72).

Equally disingenuous is defense counsel's assertion that the stub books show "persuasively" that the outstanding checks "were issued and mailed in due course." (Br. at 44). Although the issue was not explored in depth because it was not essential to the Government's case, the circumstances strongly indicate that the checks remained outstanding because they were never mailed. According to the stub book entries (GXs 200-335) these checks were payable to hotels. Two were in amounts of over $3,000; four others were in amounts of over $1,000; forty-three others were in amounts of over $100; and only three were in amounts under five dollars. (GX 338). The suggestion which appellate defense counsel apparently advances in this Court, that the various hotels received the Nathan checks and failed to deposit them in their own accounts is, to put it mildly, tenuous. In addition the position now asserted by defense counsel flatly contradicts the claim of trial defense counsel, who told the jury in his opening that the defense would show that the defendant had ordered the checks voided but that the bookkeeper had failed to carry out these instructions. (Tr. 13-14). No such proof was introduced.

reached any conclusion but that Nathan was acutely aware of the outstanding stale checks and of the understatement of the company's profits resulting from his refusal to allow any adjustments for them. The proof at trial showed that Nathan totally dominated the company. He was, moreover, the primary signatory on the company's checking account, which he used for personal purposes as well as company business. Nathan could not have kept track of his bank balance without being aware of the outstanding check situation. (Tr. 393).

The evidence of the defendant's wilfulness with respect to his check cashing was primarily circumstantial, but as powerful as that concerning his use of the outstanding check device. The defendant's practice of cashing the checks without making appropriate records or informing his accountants was on its face a highly irregular and deceptive course of business, explicable only as a device to conceal the transfer of cash to himself and cause the corporation's books to understate its taxable profits. See *Spies* v. *United States*, 317 U.S. 492, 499 (1943); *United States* v. *Chestnut*, Dkt. No. 75-1268 (2d Cir., Mar. 8, 1976). The company check stub books (GXs 11-30, 200-335) established that Nathan wrote the stubs for the checks he cashed so that they looked just like stubs of "refund" checks, causing three different accountants—Edwards, Katz and Dunst —erroneously to show the cashed checks as "refunds" rather than payments to the defendant. In addition, Katz testified that Nathan told him that checks to hotels were "client checks" and never told him that he was cashing some of those checks. (Tr. 395). Katz also testified that he specifically asked Nathan to write on check stubs the purposes for which checks were written (Tr. 224), a simple practice which would, of course, have prevented the understatement of income. The stub books (GXs 11-30, 200-335) reveal that Nathan never complied with Katz' request. Rather, he continued to

write the check stubs in a manner which virtually insured that the cashed checks would be erroneously classified as "refunds" to hotels.* The defendant's knowledge of the tax consequences of his check cashing scheme was supported by the Covernment's proof that after mid-1970, when the defendant was informed of the Internal Revenue Service investigation, he significantly curtailed his cashing of checks. (GXs 31-145, 336).

The defense's primary argument concerning the cashed checks is that the Government failed to show by direct evidence that the defendant did not use the money for business purposes. The law is clear, however, that the Government has no such burden. Rather, the courts recognize a presumption that a taxpayer declared on his tax returns all costs and expenses for which he was entitled to a deduction. As the Court of Appeals for the Seventh Circuit observed, in affirming a tax evasion conviction:

> "The law is likewise clear that, once the Government proves unreported receipts having the appearance of income, and gives the defendant credit for the deductions he claimed on his return, as well as any others it can calculate without his assistance, the burden is on the defendant to

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* The defense claim that the accountants should have detected the defendant's scheme by looking at the backs of the cancelled checks is contradicted by the clear testimony that both Edwards and Katz followed the standard accountants' practice of posting to the cash disbursement book and categorizing expenditures from the check stub book before the cancelled checks came back from the bank. (Tr. 31, 174-75, 372). Even more strained is defendant's suggestion that the fact that the cashed checks were in round amounts should have tipped off the accountants to what the defendant was doing. In any event, these are arguments concerning possible inferences to be drawn from the evidence, and, as such, they could be properly addressed to a jury, but not, after their rejection by that body, to an appellate court.

> explain the receipts, if not reportable income, and to prove any further allowable deductions not previously claimed." *United States* v. *Lacob*, 416 F.2d 756, 760 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970), *cited with approval in United States* v. *Slutsky*, 487 F.2d 832, 840 (2d Cir. 1973), *cert. denied*, 416 U.S. 937, *reh. denied*, 416 U.S. 1000 (1974).

To the same effect is *Siravo* v. *United States*, 377 F.2d 469 (1st Cir. 1967) (Coffin, *J.*). There, the Government proved that the defendant had operated a company which assembled jewelry components, but despite substantial gross receipts, had not reported any income from this operation. The defendant argued that the Government had failed to introduce any testimony concerning the labor costs of the operation and therefore had not shown that labor costs could not have offset gross receipts. Affirming a conviction for failure to file a tax return, the Court stated:

> "We do not agree that the Government has any such burden. The applicable rule here is that uniformly applied in tax evasion cases—that evidence as to the amount of offsetting expenses, if payer the burden of coming forward with evidence as to the amount of offsetting expenses if any. . . . Indeed, this case is necessarily included in that rule. For in a tax evasion case the Government's ultimate burden is to show that the taxpayer received not only gross income but also taxable income, after deduction of capital *and* non-capital expenses. If that is satisfied by proof of sales receipts, absent explanation, so must be the lesser burden here." 377 F.2d 469, 473-74.

See also *United States* v. *Leonard*, 524 F.2d 1076, 1083 (2d Cir. 1975); *United States* v. *Slutsky*, *supra*, 487 F.2d at 840; *United States* v. *Bender*, 218 F.2d 869 (7th Cir.), *cert. denied*, 349 U.S. 920 (1955); *United States* v. *Hornstein*, 176 F.2d 217, 220 (7th Cir. 1949).

This case is therefore significantly different from *United States* v. *Pechenik*, 236 F.2d 844 (3d Cir. 1956) relied on by the defense. In *Pechenik* the Government did not even establish that the defendant was aware of the challenged corporate accounting practices—charging capital investments as current expenses—whereas here the accountants discussed the outstanding stale check problem with the defendant who saw to it that the improper practices continued unchanged. In addition, Nathan *personally* executed the clandestine check-cashing scheme. In contrast to *Pechenik*, where the tax accounting errors were arguably apparent only to an accounting expert, here the impropriety of excluding from income checks which were never presented for payment and checks cashed by the defendant was perfectly obvious, and the defendant was specifically told that his method of treating the outstanding checks violated the tax laws.

Finally, the jury was clearly instructed that a finding of wilfulness was essential for conviction. The Court charged the jury that in order to convict, it must be convinced beyond a reasonable doubt that the defendant "attempted to evade or defeat the tax by knowingly and purposely failing to state and report all of his income that he knew he had in the year involved" (Tr. 710), and that he would not be guilty if he "in good faith believes he has paid all the taxes he owes." (Tr. 710; see also Tr. 716, 719). In addition, the prosecutor clearly told the jury that the Government did not contend that the jury should convict unless it found the defendant's evasion to have been wilful. (Tr. 611, 642).

In constructing his argument concerning the sufficiency of the evidence, Nathan has utterly failed to give "full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact." *United States* v. *Harris*, 435 F.2d 74,

88 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971); *Curley* v. *United States*, 160 F.2d 229, 232 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947). Defendant's attack on the sufficiency of the evidence below amounts to nothing more than an attempt to lure this Court into sitting as a "super jury" to which counsel seeks to address an appellate summation.* This Court has repeatedly declined to assume the role which Nathan seeks to have it fill. *E.g.*, *United States* v. *Kahaner*, 317 F.2d 459, 467-68 (2d Cir. 1963), *cert. denied as*, *Corallo* v. *United States*, 375 U.S. 835 (1963). When the evidence is examined in the light most favorable to the Government—as it must be once a jury has evaluated the proof and unanimously rejected the arguments of defense counsel—see, *e.g.*, *United States* v. *Glasser*, 315 U.S. 60, 80 (1943); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972); *United States* v. *Tadio*, 223 F.2d 759 (2d Cir.), *cert. denied*, 350 U.S. 874 (1955), it is clearly sufficient to support the jury's determination of guilt. Indeed, it is difficult to imagine the jury arriving at any other conclusion.

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* Indeed, in their zeal to "sum up" appellate counsel have exceeded even the bounds of propriety normally followed at trial in summation. To establish their client's "innocence", counsel repeatedly refer to matters entirely outside the trial record such as the defendant's grand jury testimony (Br. at 4, 22 n.7, 46) and the defendant's statements to his counsel (Br. at 35, 54 n.21). In addition, in its Statement of Facts, the defense cites claims contained in affidavits submitted on a pretrial motion but never adduced on the merits. (Br. at 30-31).

POINT II

The Court did not err in refusing to charge that use of the proceeds of the cashed checks for business expenses was a defense.

Nathan also claims the Court erred in failing to charge the jury that, if it found that the defendant used the proceeds from the cashed checks to pay ordinary and necessary business expenses, that the proceeds were not additional income to the defendant. This argument is without merit because the defense that the defendant used the money for corporate purposes was not sufficiently raised by the evidence at trial to require the Court to give the charge.* Moreover, Judge Bonsal gave the defendant more than he was entitled to by allowing defense counsel to argue, and by including in the Court's charge, the substance of this unproved defense.

In this Court Nathan claims that the business expense defense was raised, relying in part on the defendant's grand jury testimony. That testimony certainly provided no basis for an instruction to the jury, since it was never admitted at trial. The defense also lamely points to the testimony of Joseph Mazzurco, the credit manager from the Waldorf Astoria, who testified that he received cash from Nathan in amounts of between $40 and $100 once every ten or twelve weeks during the years in question. (Tr. 153-55). The defense, however, choses to overlook the fact that the record contains no evidence that the cash Mazzurco received was the cash Nathan obtained when he cashed the checks at the hotels. Moreover, even assuming such a nexus were shown, the payments to Mazzurco could account for only a small fraction ** of the over

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* The burden of raising this issue was clearly on the defense. See pp. 13-14, *supra*.

** By his estimate, the witness Mazzurco would have received approximately $350 per year (an average payment of $70, five times a year). The amounts received by Nathan through his check cashing scheme were:

1967	$ 9,485.00
1968	$ 9,480.00
1969	$10,485.00
1970	$ 6,670.00

$35,000 which Nathan siphoned out of the company through this scheme; and the record shows that the defendant had numerous other sources of cash from which he could have paid Mazzurco, such as checks made out to cash or to himself from Nathan, Nathan & Nathan or one of his other companies. No other witness testified to receiving cash from the defendant,* and no other cash expenditures by Nathan were offered in defense.

It is therefore abundantly clear that, when the Court refused the requested charge, it did so on the entirely proper ground that the defendant's business expense claims had not been raised by the evidence at trial. (Tr. 728, 737).

In another recent tax evasion prosecution, this Court rejected an argument similar to that advanced by the defense here. In *United States* v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975), as here, the Government proved unreported income in the form of constructive dividends taken by the defendant from a small personal corporation. The defense produced scant evidence, in the form of unfiled draft tax returns, that the corporation had a loss during the period in question and claimed that the district court had erred in failing to charge the jury that failure of the Government to prove that the corporation had a profit would require acquittal. Judge Friendly disposed of the argument as follows:

> "In prosecutions for income tax violations, production of a rather slight amount of evidence by the Government, here the proof of receipt of what

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* One witness, Lawrence Carey, admitted having been treated to one dinner by the defendant. (Tr. 147). Even assuming the truth of the defendant's claim with respect to the witness Groppe, the money he paid Groppe was in the form of checks, not cash. (Tr. 112, 125; GXs 160-168, 368-371).

> are charitably characterized as constructive dividends rather than embezzled funds, may transfer the burden of going forward to the defendant, see Holland v. United States, 348 U.S. 121, 137-39, 75 S. Ct. 127, 99 L.Ed. 150 (1954); United States v. Vardine, 305 F.2d 60, 63 (2d Cir. 1962). Although the ultimate burden of persuasion remains with the Government, Leonard did not introduce sufficient evidence of an absence of earnings or profits to warrant submission to the jury of a claim that, except for January 1968 income, the assignment of the UCC contract to Leonard Inc. constituted an absolute defense." 524 F.2d at 1083.

Judge Friendly went on to observe that the most the defense was entitled to was a charge that, if the defendant believed that the corporation had no profit, such a belief could negate the defendant's wilfulness. *Id.* at 1084. Like Nathan, however, Leonard had made no such limited request, seeking instead an erroneous instruction that a state of affairs not shown by the evidence would be a complete defense; accordingly, his appellate argument was rejected. Nathan's argument fails for the same reason.

To the same effect is *United States* v. *Gross*, 286 F.2d 59 (2d Cir.), *cert. denied*, 366 U.S. 935 (1961), a tax evasion prosecution in which several $4,000 payments and two $2,500 payments were claimed to be unreported income. The defense adduced some proof that the defendant had received the $4,000 payments as a conduit, immediately turning them over to others, but no such proof was introduced concerning the $2,500 payments. Accordingly, this court upheld as proper the trial court's rejection of a proposed instruction that the defendant would not be guilty if he did not retain the money for his own use, reasoning "there was no evidence even suggesting that defendant had not retained the two $2,500 payments if he had received them." 286 F.2d at

61. See also *United States* v. *Steinberg*, 525 F.2d 1126, 1132 (2d Cir. 1975); *United States* v. *Clark*, 498 F.2d 535, 537 (2d Cir. 1974); *Yarborough* v. *United States*, 230 F.2d 56, 61 (4th Cir. 1956); *cf. United States* v. *Breitling*, 61 U.S. (20 How.) 252, 254-55 (1858); *United States* v. *Carroll*, 510 F.2d 507, 509 (2d Cir. 1975); *United States* v. *Pollack*, 474 F.2d 828, 831 (2d Cir. 1973); *Morris* v. *United States*, 326 F.2d 192, 195 (9th Cir. 1963); *United States* v. *Achilli*, 234 F.2d 797, 808 (7th Cir. 1956), *aff'd*, 353 U.S. 373 (1957).

Finally, the record leaves no doubt that Nathan managed to place before the jury the substance of his contention that he used the proceeds of the cashed checks for business expenses. Defense counsel emphasized that claim in summation (Tr. 663); and the Government argued that the circumstantial proof showed that Nathan used the money for personal purposes. (Tr. 640, 687-88). Judge Bonsal charged the jury that the Government had the burden of proving that Nathan had knowingly failed to report all his income (Tr. 707-08), and that Nathan contended that, ". . . his accountant, Katz, erred in recording certain checks as refund checks when they should have been recorded, I think, as T and E, travel and entertainment." (Tr. 708-09). Later, in response to a question from the jury Judge Bonsal referred to the Government's claim that the defendant "cheated the Government by cashing these checks and using them for his own purposes." (Tr. 736).

On this matter, Nathan received more than that to which he was entitled. Given the absence of proof that Nathan in fact used the money for business expenses, Judge Bonsal could have entirely excluded the business expense theory from his charge.

POINT III

The Court did not abuse its discretion when it excluded the Groppe tape temporarily until the defense could prepare its offer; and the defense waived the issue by later deciding not to offer the tape.

Defendant's claim of error in the Court's treatment of the tape recording of the alleged conversation between the defendant and Leonard Groppe, the credit manager of the St. Mortiz Hotel, is similarly untenable. Contrary to Nathan's argument, the record is clear that the defendant was in no way precluded by the Court from introducing the tape recording. Rather, when the defense first sought to introduce the tape, it was unable to properly identify the section or sections of one or more tapes being offered or to state whether an entire conversation or only a portion of it was being offered. The Court then directed defense counsel to proceed with his examination of Groppe, preserving the defense's right to offer the tape at a later time and to inquire into the subject either then or later. The defense, however, decided not to reoffer the tape. The question before the Court is not, as defendant would have it, whether Judge Bonsal improperly excluded the tape but, instead, whether the Court abused its discretion in refusing the defendant's initial offer of the tape, and whether the defense waived the issue by failing to reoffer the tape in proper form.

On direct examination Groppe testified that Nathan, Nathan & Nathan performed collection work for the St. Mortiz Hotel and that, in addition, the defendant cashed checks (GXs 130-40, 147-57) at the hotel from time to time. Groppe also testified that he personally had also received payments from Nathan, Nathan & Nathan for some collection work he had done for the defendant on Long Island. (Tr. 112). On cross-examina-

tion defense counsel established that Groppe had also told the Internal Revenue Service about his personal collection work for the defendant when an Internal Revenue Service agent had shown Groppe two checks from Nathan, Nathan & Nathan payable to him. (Tr. 125-26). The defense then sought to impeach Groppe with a tape which purported to be * a conversation between Groppe and the defendant in which Groppe acknowledged that he had never done any collection work for the defendant's company and that he had lied to the Internal Revenue Service agent when he told him about the collection work. (Appellant's Appendix II).

But when the defense offered the tape recording, defense counsel was unable to find the entire conversation on the tape or even to state whether he had a recording of the entire conversation. In addition, defense counsel did not know whether the conversation in question was contained on one or several tapes, or whether the cassette containing the passage of interest to the defense contained only the conversation between the defendant and Groppe or other conversations as well.

Relevant portions of the trial transcript read as follows:

> (At the side bar.)
>
> "The Court: What is the problem?
>
> Mr. Bender: We have a tape recording of a conversation which I alluded to on cross-examination.
>
> The Court: A tape recording of what?
>
> Mr. Bender: A conversation between this witness and Mr. Nathan.
>
> The Court: When?

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* The tape was never authenticated by any testimony.

Mr. Bender: Taken subsequent to the time that he gave a statement to . . . [Internal Revenue Agent] Schneider, which is this year, I think.

The Court: What's the date of the tape?

Mr. Bender: I have to check it. I have to check it. I have to find out.

The Court: Find out.

(Pause)

Mr. Bender: 5/21/74.

The Court: And who initiated the call?

Mr. Bender: I think he said that he called.

The Court: But I don't know if that's the one that you have the tape on.

Mr. Bender: I think he said he did.

The Court: You must know who initiated the call.

Mr. Bender: I wish I did. I can find out.

(Pause)

Mr. Bender. Mr. Nathan says that the witness called him." (Tr. 129).

Then after listening to a portion of the tape, the Court stated:

"The Court: We are going to waste a lot of time on this, but it looks as though he didn't start in the beginning. Let's find that and put that on. See if you can find that.

* * * * *

The Court: I am ruling if you insist on it, if we get the beginning of the conversation you can put it in and on the redirect he can bring out all kinds of things if he wants to, but okay.

The Court: Have we got the beginning of that conversation?

The Defendant: I believe so, I have trouble with my eye from that operation, so you will forgive me.

[Tape played.]" (Tr. 134).

After the defendant played still a second conversation for the Court, the following colloquy took place:

> "The Court: That's what I am looking for. Where is the beginning?
>
> The Defendant: Excuse me, Your Honor, I believe at the end of this we will go open to the other. I believe so. I haven't played these things——
>
> The Court: You think this is a different conversation?
>
> The Defendant: Yes, sir.
>
> [Tape played.]
>
> The Court: I am trying to get the beginning of the one that you had before. You don't know?
>
> The Defendant: No, I don't know." (Tr. 135).

Finally, frustrated by the defense's confusion about exactly what it was offering and concerned about an unnecessary waste of time, the Court stated:

> "The Court: Gentlemen, what I think I am going to do with this thing, I am not going to put this on now. I will let you cross-examine him about the content and if during the defendant's case you get this straightened out, you find out what conversations are what and who originated them and you want to put them on in the defense case, that will be all right, and if it is necessary to recall the witness we can do that, but I think on the present state I am not going to permit this to be presented to the jury now.
>
> Mr. Bender: I just want to say that I don't want my silence to acquiesce with your ruling. I think this man's impact is now.
>
> The Court: Nobody seems to know when this conversation started or when it ended. I will give you a chance to do that." (Tr. 135-36).

The record is clear that the Court properly exercised its discretion to expedite the trial by directing defendant to proceed with the witness' cross-examination, deferring the admission of the tape until the defense was prepared to make a proper offer.* Fed. R. Evid. 403. But even if the Court could be said to have erred in excluding the tape recording when first offered, the error would have been harmless inasmuch as the defendant was not precluded by the Court from exploring the content of the conversation with the witness, Groppe, through other means and reoffering the tape later in the trial. See *United States* v. *Badalamente*, 507 F.2d 12, 21-22 (2d Cir. 1974).

On the day following the initial offer of the tape, defense counsel announced that he would not introduce the tape because the defense had "lost the effect of it by not bringing it out and to bring it in on my case doesn't help." (Tr. 263-64). Again, before the defense rested (Tr. 577-78), the Government announced that Groppe was available in the witness room for further cross-examination and possible introduction of the tape. As a matter of trial strategy, the defense decided not to resume cross-examination of Groppe or reoffer the tape.**

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* Aside from questions of authenticity, see Fed. R. Evid. 901, the offer was deficient in that the defense's inability to assure the Court that it was presenting the full conversation might well have foreclosed the Government from insisting that as a matter of fairness the conversation, in its entirety, be played for the jury. See Fed. R. Evid. 106.

** Defendant's strategic decision not to reoffer the tape or follow through with further examination of Groppe on the subject of the alleged phone conversation with the defendant may be easily explained by the Court's observation after the available portion of the tape was played out of the presence of the witness and the jury:

"The Court: I have heard the tape and it is clear enough. I still have some question as to why this should

[Footnote continued on following page]

Having declined the invitation to question Groppe further following the Court's initial ruling and having declined the Government's offer to return Groppe to the stand, the defendant is nonetheless surprisingly at ease with an argument that the Court precluded him from impeaching the witness with the alleged telephone conversation. The defendant made his bed; he should be left to lie in it.

POINT IV

The charts were properly admitted as summaries of the exhibits and the jury was properly instructed with respect to their weight.

Defendant claims that two of the four charts admitted in evidence—Government Exhibits 336 and 338—unfairly prejudiced the defendant and that the jury was not given a proper limiting instruction in the court's final charge.

Admission of the charts was clearly proper under the well-settled principle that charts may be used to summarize facts contained in other exhibits received in evidence. *United States* v. *Silverman*, 449 F.2d 1341 (2d Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); *United States* v. *Schenck*, 126 F.2d 702 (2d Cir.), *cert. denied*, 316 U.S. 705 (1942). Government Exhibit 336 was a compilation of dates, amounts, payees and endorsements from the 115 checks (GXs 31-145) which the defendant had cashed at four hotels. Similarly, Government Exhibit 338 was a compilation of 138 dates,

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be played before the jury. Listening to the tape, it looks as though it wasn't Schneider [the I.R.S. Agent] who is doing the pressuring, it might have been the defendant who was doing the pressuring and the jury might get that impression." (Tr. 133, see also Tr. 577).

amounts and payees from check stub book entries (GXs 200-335) relating to the outstanding checks. These entries were culled from thousands of such entries in the stub books themselves (GXs 11-30). On both charts the checks were arranged by year, and were totalled at the bottom. Each chart also showed the exhibit numbers of the other exhibits from which the information on the charts was obtained.*

Significantly, the defense made no claim at trial, and makes no claim here, that either of the charts was in any way inaccurate or that the charts include any information not admitted into evidence. Rather, the defendant argues that the size of the charts, seven and one-half feet by three feet, was too large. A brief examination of the charts reveals, however, that they are composed of lettering less than an inch high, and their size was dictated by the amount of information on them, and the requirement that the jury be able to read them.

Secondly, the defendant relies heavily on the fact that the Court did not include in its charge an instruction with respect to the charts. At the time the first chart was admitted, however, Judge Bonsal told the jury that it was "merely a chart . . . which contains the information as to these various checks, Exhibits 31 to 145. The checks themselves are in evidence, the chart is merely to help you as a pictorial representation." (Tr. 440). A few minutes later, when Government Exhibit 338 was admitted, Judge Bonsal told the jury that the exhibit numbers of the source information would be added to the chart. (Tr. 447). These instructions adequately conveyed to the jury the substance of the normal cautionary instruction con-

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* Nathan's assertion (Br. at 65) that "the charts focused the jury's attention on matters which did not bear upon the issues in the case" is utterly frivolous. The two charts, taken together, reflected nothing less than each and every unreported income item on which the Government's case was predicated.

cerning charts. See *Holland* v. *United States*, 348 U.S. 121, 128 (1954); *United States* v. *Goldberg*, 401 F.2d 644, 647 (2d Cir. 1968). That the jury understood this principle is demonstrated by the fact that, during its deliberations, the jury requested only one of the two charts in issue and almost all of the source exhibits which the charts summarized. (Tr. 732-34). Under these circumstances the fact that the court inadvertently failed to restate during its charge the instruction it had already given the jury hardly constitutes reversible error, especially since the defendant failed to make a specific objection to the charge on the point. Fed. R. Crim. P. 30; *United States* v. *Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975); *United States* v. *Pinto*, 503 F.2d 718 (2d Cir. 1974).

POINT V

Judge Bonsal did not become partisan in favor of the Government or deprive the defendant of a fair trial.

The defense also claims that Judge Bonsal's conduct of the trial impermissibly favored the prosecution and denied the defendant a fair trial. While arguing that Judge Bonsal conveyed to the jury an impression that he believed the defendant to be guilty, the defense cites no statement by Judge Bonsal even suggesting such a conclusion. Nor does the defense cite any course of partisan behavior by Judge Bonsal similar to the incidents which provoked this Court's criticism in *United States* v. *Fernandez*, 480 F.2d 726 (2d Cir. 1973); *United States* v. *Nazzaro*, 472 F.2d 302 (2d Cir. 1973); *United States* v. *Grunberger*, 431 F.2d 1062 (2d Cir. 1970); and *United States* v. *Guglielmini*, 384 F.2d 602 (2d Cir. 1967).

In those cases, the trial judge substantially assumed the prosecutor's function, conducting extensive, partisan

cross-examination of defense witnesses and, in some cases, direct examination of Government witnesses. Here, in contrast, the defense is able to point to only a few examples of Judge Bonsal's impartial rephrasing of counsel's questions or posing questions of his own for the purpose of either expediting the proceedings or clarifying the testimony, which occasionally lapsed into arcane accounting jargon. The trial court's authority to take such action is clear. See *United States* v. *Natale*, Dkt. No. 75-1276 (2d Cir. Nov. 28, 1975) slip op. 793; *United States* v. *Cuevas*, 510 F.2d 848, 850 (2d Cir. 1975); *United States* v. *DeSisto*, 289 F.2d 833, 834 (2d Cir. 1961); *United States* v. *Pellegrino*, 470 F.2d 1205, 1206-07 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973). Indeed, on several occasions defense counsel himself acknowledged the Court's assistance. (Tr. 161-62, 286, 292). More significantly, defense counsel never objected to the Court's intervention or claimed judicial interference as is now argued on appeal. Although the defense places great weight on the fact that Judge Bonsal interrupted examination by defense counsel in the absence of a government objection, the defense seems to ignore the fact that from time to time Judge Bonsal raised objections *sua sponte* on behalf of the defense (Tr. 382, 401), made observations helpful to the defense (Tr. 349), and interrupted or curtailed Government counsel's examination of witnesses. (*E.g.*, Tr. 170, 195, 198, 199, 204-05, 211, 222, 235-37, 243, 342, 374, 384, 390, 397, 421). An examination of the entire record reveals that Judge Bonsal conducted the trial fairly and impartially.*

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* The defense also claims that it was error for the Court to take a partial verdict. However, defendant's reliance on Rule 31(b) of the Fed. R. Crim. P. is misplaced. That section relates solely to multiple defendant cases. With respect to single defendant cases, Rule 31 of the Fed. R. Crim. P. merely requires that the verdict be unanimous. After the guilty verdict on Counts One through Four, the jury was polled and the verdict was unanimous. (Tr. 745-46). Moreover, the defendant did not object to the Court's taking of the partial verdict. See *United States* v. *Andreadis*, 366 F.2d 423, 434-35 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

As its first example of allegedly improper comment by the District Court, the defense points to Judge Bonsal's question to Edwards on redirect examination whether "anybody else discharged you because they didn't want to go along with your accounting ideas?" (Tr. 88). Clearly, the thrust of Edwards' testimony on direct examination was that the defendant discharged him in response to Edwards' insistence that the accounting methods of Nathan, Nathan & Nathan be brought into compliance with the tax laws. (Tr. 32-47). On cross-examination, defense counsel sought to establish that the witness could remember nothing but information contained in the documents of his file. (Tr. 51-52). Accordingly, it was entirely proper for the government on redirect to seek to establish the peculiarity of the circumstances of Edwards' dealings with the defendant which may have caused him to recall those events more clearly than others; and the Court's summary of Edwards' prior testimony in this context was wholly accurate. The defense's contrary claim here that the defendant discharged Edwards because of the accountant's failure to file tax returns on schedule is specious, given Edwards' testimony that the reason for the lelay was the defendant's refusal to provide appropriate support for the tax returns, as the defendant wanted them filed.

The defense's second claim of improper judicial intervention is equally devoid of merit. Defense counsel apparently was of the view that Edwards had materially changed his testimony on cross-examination when he testified that the defendant had specifically told him not to write off the outstanding checks. Defense counsel then sought to engage the witness in an entirely unnecessary memory test by asking him whether he had testified to the same effect on direct examination. (Tr. 76). The Court attempted to move the examination forward observing, "It doesn't matter. He is telling us now." (Tr.

77). In any event, the witness was allowed to answer the question, and said that the defendant "refused to give me a definitive answer of what I should do." His response was therefore available for whatever argument the defense counsel wished to make of it.* Defense counsel's other complaints involve examples of instances when the cross-examination had obviously become bogged down on minor items, such as whether Edwards had refused to prepare the defendant's tax returns or had prepared them but refused to release them because of the defendant's refusal to make the changes Edwards required. (Tr. 65). Certainly it cannot be said that the Court prevented defense counsel from cross-examining Edwards or any other witness. In its rush to claim that the Court "rescued" Edwards on several insignificant issues, the defense fails to note that frequently the Court rescued defense counsel from the tangle of vague, incomprehensible or compound questions. (Tr. 51, 56, 60, 62, 66, 67, 71, 75-76). In addition, the Court specifically instructed the jury:

> "Above all, draw no inference from anything I said during this trial which might lead you to believe that I favor one side or the other here because, of course, I do not. That is not my function, that is yours." (Tr. 699).

Finally, in a bootstrap attempt to support its unfounded claim that Judge Bonsal was prejudiced against the defendant, the defense asserts that the defendant received an excessive sentence. When examined in light of the defendant's crimes, committed out of no motive other than sheer greed and in the face of a clear professional

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* Clearly the ability of the witness to recall the details of his direct examination did not matter. In addition, the inconsistency which defense counsel was questioning about, whether Nathan had directly told Edwards not to reverse the outstanding check entries or instead had refused to respond to Edwards' several inquiries (Tr. 44, 77), was insignificant. (See Defendant's Exhibit B).

warning that his behavior violated the tax laws, we submit that the sentence here was entirely apropriate and offers no support for the defense claim that Judge Bonsal treated the defense unfairly.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 280 A. -Affidavit of Service by Mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Olga C. Gramm, being duly sworn deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

Stating also that on the 18th day of March - 1976, she served a copy of the within Brief for the U.S.A. on Jack Nathan by placing the same in a properly postpaid franked envelope addressed:

Nathan Lewin, Jamie S. Gorelick
Miller, Cassidy, Larroca & Lewin
2555 M. Stret, N.W. Washington, D.C.
20037.

And deponent further says that she sealed the said envelope and placed the same in the mailbox for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York

Olga C. Gramm

Sworn to me before this
18th day of March, 1976

Mary L. Avent
MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977